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IN THE

Supreme Court of the United States

JANUARY TERM, 1970

No. 1139

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,

—against—

HAROLD KONIGSBERG,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

PAGE

Opinion Below 1

Jurisdiction 2

Question Presented 2

Constitutional Provisions Involved 2

Statement of the Case 2

Reasons for Granting Certiorari:

a) The Court erred in remanding appellant's criminal proceeding to the New York City Criminal Court on a finding that the Civil right to a speedy and jury trial is not one cognizable under Title 28, U.S.C. § 1443 (1) and the vindication of appellant's federal rights unenforced and/or denied should be left to the State Courts 6

CONCLUSION 15

APPENDICES TO PETITION

Appendix A—Docket Entries 1a

Appendix B—Memorandum Opinion, Hon. Charles H. Tenney, District Judge, June 30, 1969 ..... 2a

Appendix C—Notice of Appeal 5a

Appendix D—Criminal Court Information 7a

Appendix E—Endorsement, 68 Civil 3414, Hon. Sylvester J. Ryan, U.S.D.J., October 11, 1968 ..... 21a

Appendix F—Opinion of Hon. Mitchell D. Schweitzer, Justice, Supreme Court of the State of New York, Spetember 16, 1968 ..... 23a

PAGE

Appendix G—Judgment, Index No. 9206/1967—Article 78 Proceeding, Supreme Court, New York County.. 26a

Appendix H—Judgment, Index No. 17932/68—Article 78 Proceeding, Supreme Court, New York County.. 28a

Appendix I—Argument before Hon. William Ringel, Criminal Court, New York County, September 22, 1969 ..... 30a

Appendix J—Affirmance and Judgment of the United States Court of Appeals, For the Second Circuit, November 4, 1969 ..... 38a

Appendix K—Constitutional Provisions Involved 39a

TABLE OF CASES CITED:

Bloom v. *Illinois*, 391 U.S. 194 (1968) 8, 14

Chef v. *Schnackenberg*, 384 U.S. 373 (1966) 14

Chestnut v. *New York*, 370 F.2d 1 (2d Cir. 1966) 11, 15

Dyke v. *Taylor*, 391 U.S. 373 (1968) 14

Duncan v. *Louisiana*, 391 U.S. 145 (1968) 8, 13, 14

Frank v. *United States*, 89 S. Ct. 1503 (1969) 14

Georgia v. *Rachel*, 384 U.S. 780 (1966) 10

Greenwood v. *Peacock*, 384 U.S. 808 (1966).... 10, 11, 12, 15

Klopfer v. *North Carolina*, 386 U.S. 213 (1967) 7, 14

People v. *Mudia*, 12 Misc. 2d 438 8

People v. *Prosser*, 309 N.Y. 353 8

People v. *Winfrey*, 20 N.Y.2d 140 (1967) 7, 14

Smith v. *Hooey*, 392 U.S. 925, 393 U.S. 374 (1969) 7, 13, 14

United States ex rel. Perkins v. *Noble*, 287 F. Supp. 365 (EDNY 1968) 10

PAGE

RELEVANT CONSTITUTIONAL PROVISION

Article VI, Clause 1, § 2, United States Constitution.. 2, 13

First Amendment, United States Constitution 2

Sixth Amendment, United States Constitution....2, 6, 13, 14

Eighth Amendment, United States Constitution 2

Fourteenth Amendment, United States Constitution.. 2, 13

RELEVANT STATUTES

Federal:

Title 18, United States Code § 659 3

Title 18, United States Code § 4241 3

Title 28, United States Code § 1254(1) 2

Title 28, United States Code § 1443(1)
2, 5, 6, 9, 10, 11, 12,15

Title 28, United States Code, § 1447(c) 5

Title 42, United States Code § 1983 .....

New York State:

Civil Rights Law § 12 7

Penal Law of the State of New York, § 600(1) 3

MISCELLANEOUS

New York Law Journal, July 14th, 1969, page 1,
Disciplinary Proceedings .....

IN THE

Supreme Court of the United States

JANUARY TERM, 1970

No. .....

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents,

—against—

HAROLD KONIGSBERG,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Second Circuit, entered in this case on November 4th, 1969 (Appendix J, p. 38a).

Opinion Below

The Court of Appeals, Second Circuit, did not render an opinion but filed and entered a judgment affirming the order of remand of the United States District Court for the Southern District of New York (Appendix B, p. 2a).

Jurisdiction

The order and judgment of the Court of Appeals, Second Circuit (Appendix J, p. 38a, *infra*) was made and entered November 4th, 1969. The jurisdiction of this Court is involved pursuant to Title 28 U.S.C. § 1254(1).

Question Presented

Whether the Court erred in remanding appellant's criminal proceeding to the New York City Criminal Court on a finding that the civil right to a speedy and jury trial is not one cognizable under Title 28 U.S.C. § 1443(1); and that vindication of appellant's federal rights unenforced and/or denied should be left to the State Courts.

Constitutional Provisions Involved

The constitutional provisions involved are Article VI, Clause 1, § 2, First, Fifth, Sixth, Eighth and Fourteenth Amendments and are printed herein as Appendix K, p. 39a, *infra.*

Statement of the Case

This is an appeal from the affirmance of the order of remand dated June 30th, 1969, of the United States District Court for the Southern District of New York (Hon. Charles H. Tenney, District Judge) in Civil Case No. 69-2088 (Appellant's Appendix B, p. 2a), and from the denial of petitioner Harold Konigsberg's[1] petition for removal under Title 28 U.S.C. § 1443(1).

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[1] Hereinafter referred to as "Konigsberg", presently a federal prisoner housed at the United States Medical Center in Springfield, Missouri, pursuant to a judgment of conviction out of the

On April 10th, 1967, an action was commenced against Konigsberg in the Criminal Court of the City of New York, New York County, under Docket No. B-3615/1967, entitled "The People of the State of New York—against—Harold Konigsberg, defendant," by the service of an information charging Konigsberg in twelve counts with the crimes of Criminal Contempt, in violation of the then existing Penal Law of the State of New York § 600(1)[2] (Appellant's Appendix D, p. 7a).

On April 10th, 1967, April 27th, 1967, and May 2nd, 1967, the respondent, People of the State of New York[3] moved the information for immediate trial. Konigsberg

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United States District Court of New Jersey (Robert Shaw, D.J.) under Docket No. 31-62, for violation of stolen goods from interstate commerce, 18 U.S.C. § 659. Konigsberg was sentenced on July 16th, 1963, to a term of ten years. During all the proceedings mentioned herein appellant has been in federal custody.

[2] The subject-matter of the criminal contempt allegedly arose during the course of a trial in New York State Supreme Court, New York County, in which Konigsberg was tried for extortion and other related counts. The trial was lengthy and protracted and previous to same, the federal prisoner Konigsberg was certified a mental incompetent and insane pursuant to Title 18 U.S.C. § 4241. He nevertheless was permitted to act as his own lawyer. The result was that on April 10th, 1967, he was sentenced to a New York State prison term of thirty to forty-four years to commence after completion of his present ten year sentence. That conviction is currently on direct appeal in the Appellate Division, First Department, New York Supreme Court. The New York County Prosecutor claimed that Konigsberg during the above-mentioned trial made remarks amounting to criminal contempt. An illiterate until a short time ago, Konigsberg taught himself how to read and write while in prison and his courtroom discourses, comments and remarks are quoted in the information albeit out of context. For a full grasp of these charges the almost 8,000 page record of New York Supreme Court trial should be read.

[3] The People of the State of New York hereinafter referred to as the "New York County prosecutor".

resisted these moves to the extent of seeking time to make preliminary motions.

On April 24th, 1967, Konigsberg moved that he be granted a Certificate that the misdemeanor charges in the information be prosecuted by indictment. Said application was denied by the Hon. Mitchell D. Schweitzer, a Justice of the Supreme Court, New York County, then presiding in Party XXXII, pursuant to Order No. 1600.

On June 5th, 1967, Konigsberg brought on an Article 78 Proceeding in the Supreme Court of the State of New York, New York County, Special Term, Part II, under Index No. 9206/1967. The Hon. Nathaniel T. Helman, a Justice of the Supreme Court of the State of New York, denied said application on June 15th, 1967 (Appendix G, p. 26a).

On September 19th, 1967, Konigsberg moved for a dismissal of the information on jurisdictional grounds. Motion was denied February 1st, 1968.

On September 16th, 1968, an order was entered in Part XXX of the Supreme Court of the State of New York, New York County, by the Hon. Mitchell D. Schweitzer denying Konigsberg's motion for a speedy trial (Appendix F, p. 23a).

On October 3rd, 1968, Konigsberg moved for a speedy trial and in the alternative for an order dismissing the information on the failure of the People to prosecute same. On October 8th, 1968, the Hon. Daniel Weiss, a Judge of the Criminal Court of the City of New York, denied the motion and by his order the instant case was marked off calendar.

On October 11th, 1968, an order was entered in the United States District Court for the Southern District of

New York, by the Hon. Sylvester J. Ryan denying Konigsberg's earlier petition for removal and remanding the proceedings to the New York Criminal Court. In the endorsement on the remand proceedings (68 Civil 3414) (Appendix E, p. 21a) Judge Ryan indicated:

> "The record shows that petitioner has a motion for speedy trial now pending in the Criminal Court of the City of New York. Petitioner has not exhausted his *ample available remedies in the State Courts* and it appears that he has not been deprived of his federal constitutional rights." (Stress supplied)

As a result of Judge Ryan's opinion, Konigsberg again moved by Article 78 proceeding in the Supreme Court of the State of New York, under Index No. 17,932/68, New York County, for a speedy trial. On January 3rd, 1969, the Hon. Charles Marks, a Justice of the Supreme Court of the State of New York, cognizant of Judge Ryan's opinion dismissed Konigsberg's petition for a spedy trial and to set a day certain for trial (Appendix H, p. 28a).

Having now failed in all endeavours, Konigsberg filed on May 14th, 1969 a petition for removal of the New York Criminal Court proceedings to the United States District Court pursuant to 28 U.S.C. § 1443(1). On May 27th, 1969, the New York County prosecutor moved for remand pursuant to 28 U.S.C. § 1447(c). On June 30th, 1969, the proceedings were ordered remanded by Judge Tenney, who indicated in his opinion (Appendix B, p. 4a):

> "The vindication of the petitioner's federal rights must be left to the state courts wherein a motion may be made before the trial court for dismissal of the information for failure to proceed in consonance with the Sixth Amendment's guarantee of speedy trial."

Konigsberg filed a notice of appeal in the instant action on July 22nd, 1969, from Judge Tenney's order and memorandum opinion. The United States Court of Appeals affirmed on November 4, 1969 (Appendix J, p. 38a).

Reasons for Granting Certiorari

a) The Court erred in remanding petitioner's criminal proceeding to the New York City Criminal Court on a finding that the civil right to a speedy and jury trial is not one cognizable under Title 28 U.S.C. § 1443(1) and the vindication of appellant's federal rights unenforced and/or denied should be left to the state courts.

The District Court did not in its memorandum opinion (Appendix B, p. 2a) dispute Konigsberg's contention that he is entitled to a speedy trial and adjudication of the charge lodged against him in the Criminal Court information. The Court spoke of the vindication of Konigsberg's federal rights (Appendix B, p. 4a). It suggested that Konigsberg return to the State forums again for remedy despite the fact that the record is replete with his previous and repetitive failure at such efforts.

The District Court's position as affirmed by the Court of Appeals is that the Sixth Amendment right to speedy trial as guaranteed by the United States Constitution is within the due process clause of the Fourteenth Amendment. While the right to a prompt adjudication is a civil right the Court argued that it is not an equal civil right but of general application and not within the intendment of 28 U.S.C. § 1443(1). In this the Court rejected Konigsberg's reasoning and adopted the rationale of the New York County prosecutor. The argument as thus conceived is narrow and fallacious and such a formula and distinction leaves defendants in state prosecutions, let alone New York,

with constitutional rights and safeguards impossible to vindicate and uphold until a long appellate process and the search for state remedies are thoroughly exhausted, leaving a state defendant more often than not a lone survivor of the legal labyrinth.

Konigsberg is entitled to a speedy trial grounded in the Sixth Amendment as applicable to the State via the Fourteenth. *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967); *Smith* v. *Hooey*, 392 U.S. 925, 393 U.S. 374 (1968). Moreover, in New York the right to a speedy trial is found in the Civil Rights Law, § 12. *People* v. *Winfrey*, 20 N.Y.2d 140 (1967). It is thus manifestly clear that Konigsberg is entitled to realization of this civil right equally with any other defendant who faces criminal prosecution under American standards of criminal justice. The record is likewise clear that the New York County prosecutor with the acquiescence of the State Courts has resolutely resolved and resisted every conceivable attempt to move the contempt case for trial. (See Appellant's Appendix I, pp. 32a, 33a). This, despite the fact that when Konigsberg was arraigned on the Criminal Court information the New York County prosecutor steadfastly opposed the granting to Konigsberg of any time to make preliminary motions against the information and insisted instead on an immediate trial. This is a far-cry from the posture subsequently assumed by the same New York County Prosecutor.

Konigsberg insisted in his several applications and memorandums of laws submitted for the consideration of the Supreme Court of the State of New York and the Criminal Court of the City of New York that not only was prejudice presumed when delay was shown but without a prompt trial his defense was rendered obsolete with the

passage of time and the inability of obtaining witnesses.[4] *People* v. *Mudia*, 12 Misc. 2d 438, 177 N.Y.S.2d 234; *People* v. *Prosser*, 309 N.Y. 353.

Konigsberg, furthermore insisted in his moving papers that he desired and was entitled to a trial jury as was his constitutional right. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Bloom* v. *Illinois*, 391 U.S. 194 (1968). In the twelve count information lodged in the Criminal Court of the City of New York, if found guilty, Konigsberg faced a maximum sentence of twelve years. Mr. Justice White, delivering opinion of the Court, indicated in *Duncan* v. *Louisiana*, *supra*, page 149:

> "Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the fourteenth amendment guarantees a right to a jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment guarantee."

The New York State and City Courts have refused to grant Konigsberg a trial by jury.

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[4] One such witness is former attorney Frances Kahn who has departed from the New York jurisdiction and made herself unavailable for her own hearing before the New York Bar Association which resulted in her disbarment. (New York Law Journal, July 14, 1969, p. 1.) This key witness is of vital importance to Konigsberg since she was present when the acts complained of in the criminal information occurred. Furthermore, there is information available to Konigsberg that she intends to leave the country which would deprive him of her testimony completely and render his defense sterile. The Appellate Division, First Department, Supreme Court, has characterized her failure to respond as a "*disapparance*" the whereabouts of Kahn when Konigsberg moved for a speedy trial were then known.

Konigsberg's denial in two Article 78 Proceedings in the New York State Supreme Court (Appellant's Appendix G and H) clearly demonstrates that appellant is without remedy in the State Courts to enforce his constitutional rights and is obliged to await the pleasure of the New York County prosecutor who traditionally controls trial calendars in the Courts. Even if Konigsberg were to be vindicated after a trial, the exhaustion of a state appellate process and a return to the Federal system on a collateral attack for redress would be a shallow triumph indeed for it would have drained his resources, imposed hardship upon his family, the passage of time in jail and a torment to his physical and mental well being. It likewise burdens the United States Bureau of Prisons because of detainers lodged through malicious prosecutions. The impossibility to obtain relief in the state courts makes it imperative that redress be made available to him in the federal courts. Moreover a failure to accord Konigsberg such a forum would be a violation of his First Amendment right under the Constitution and the attendant cost in disallowing him such a relief would likewise be a violation of his Eighth Amendment rights as to cruel and unusual punishment.

It should be noted that there is no appeal in the New York State Courts from an Article 78 denial and the counsels of Judges Tenney and Ryan that Konigsberg look again to the State Courts for redress and vindication are meaningless in the face of the New York State record of the undeviating demise of the appellant's constitutional rights.

The District Court maintained that it was impossible to grant Konigsberg the relief sought in the federal forum pursuant to 28 U.S.C. § 1443(1) because the civil rights of which the statute speaks are those involving the concept of equality particularly in terms of racial equality. *Green-*

wood v. *Peacock*, 384 U.S. 808 (1966); *Georgia* v. *Rachel*, 384 U.S. 780 (1966); *Chestnut* v. *New York* 370 F.2d 1 (2d Cir. 1966); *United States ex rel. Perkins* v. *Noble*, 287 F. Supp. 365 (E.D.N.Y. 1968).

The *Chestnut* case, *supra*, also involved a New York criminal contempt prosecution and the appellant's argument there was that a grand juror was required to be the owner of minimum property of the value of $250.00 was discriminatory in terms of race and that it was a violation of the equal protection clause. The Second Circuit disagreed in an opinion by Judge Kaufman. The case is interesting because it is from the Second Circuit and it is cited in support by the District Court and was decided after the important decisions of the United States Supreme Court in *Greenwood* v. *Peacock*, *supra*, and *Georgia* v. *Rachel*, *supra*.

Konigsberg's argument is not cloaked in terms of racial discrimination. His reliance on 28 U.S.C. § 1443(1) is based on the only foreseeable outlet to seek a redress of grievances under the First Amendment of the Federal Constitution involving constitutional and civil rights denied to him and which he can neither invoke, enforce nor vindicate in State tribunals already so manifestly evident from the record in the instant matter. This right to a speedy and fair trial is an admitted civil right inherent to all persons who face criminal prosecutions in American courtrooms. While true it is of general application to all persons in such jeopardy, the rights are equal to all. Konigsberg's rights under the Fourteenth Amendment are not singularly peculiar to him but may be invoked by all persons in his predicament. The reluctance to enforce these rights in State tribunals need not meet with narrow doctrines of constructions by Federal courts in which redress is sought nor is the expanding concept of the statute of limited construction. The primary intent is to vindicate

federal civil rights in federal forums when State courts refuse to act. It was the expressed view of the Second Circuit Court that the Supreme Court of the United States did not in the *Georgia* v. *Rachel, supra*, conclusively decide that a denial of a right protected by the equal protections clause of the constitution meets the requirement for removal under § 1443(1). The Second Circuit Court went on to say in *Chestnut* at page 6:

> "The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial. Under § 1443(1), the vindication of defendant's federal rights is left to the state courts except in rare situation where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court."

Mr. Justice Douglas in *Greenwood* v. *Peacock, supra*, at pages 839-840, fully covers the intent and purpose of the removal statutes. He says:

> "The removal laws passed from time-to-time have responded to two main concerns: First, a federal fact-finding forum is often indispensable to the effective enforcement of those guarantees against local action. The federal guarantees turns ordinarily upon contested issues of fact. Those rights, therefore, will be of only academic value in many areas of the country unless the facts are objectively found. Secondly, swift enforcement of the federal right is imperative if the guarantees are to survive and not be slowly strangled by long, drawnout, costly, cumbersome proceedings which the Congress feared might result in some state courts. The delays of state criminal process, the perilous vicissitudes of litigation in the state courts, the onerous burdens

> of the poor and indigent who usually espouse unpopular causes—these threaten to engulf the federal guarantees. It is in that light that 28 U.S.C. § 1443(1) should be read and construed."

In the same opinion, Mr. Justice Douglas indicated at page 854:

> "The federal court in a removal case plainly must act with restraint. But to deny relief in the cases now before us, in view of the allegations made, to aggravate a wrong by compelling these defendants to suffer the risk of an unwarranted trial and by allowing them to be held under improper charges and in prison, if the State desires, for an extended period pending trial. The risk that the state courts will not promptly dismiss the prosecutions was the congressional fear. The Court defeats that purpose by giving a narrow, cramped meaning to § 1443(1). These defendants' federal civil rights may, of course, ultimately be vindicated, if they preserve, live long enough, and have the patience and the funds to carry their cases for some years through the state courts to this Court. But it was precisely that burden that Congress understook to take off the backs of this persecuted minority and all who espouse the cause of their equality."

It is therefore evident that Konigsberg's federal constitutional and civil rights have been denied and are unenforceable in the State tribunals and that appellant seeks to redress and petition the federal courts as is his First Amendment right under the Constitution through the vehicle of 28 U.S.C. § 1443(1), as the only federal forum available to him. The rights sought to be vindicated are not only of general application but are the inherent rights of all persons in similar predicaments to Konigsberg. Moreover, the tribunals have informed and denied to

Konigsberg his right to a jury and speedy trial particularly. The state tribunals therefore refuse to apply the constitutional mandates as enunciated by the highest Court in the land in *Duncan* and *Smith, supra,* pursuant to the Sixth Amendment guarantees.

Despite his many efforts and the suggestions offered on two different occasions by the District Court, his efforts in the state tribunals have been a nullity and all state remedies have been exhausted. A detainer continues to be lodged against him for the Criminal Court contempt information despite the fact that the New York County prosecutor makes no effort to obtain a *writ of Habeas corpus ad prosequendum* in order to move the case for trial. The denial of due process is complete for the New York County prosecutor controls the trial calendars.

Konigsberg by the actions of the state courts and the New York County prosecutor is caused financial expense, mental and physical anguish and cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. The fact that he cannot obtain due process and a fair trial in the State tribunals likewise violates the breadth of his Fourteenth Amendment guarantees. Moreover, Article VI, Clause 1, Section 2, of the Constitution provides that "this Constitution, and the laws of the United States which should be made in pursuance thereof and all treaties made or which shall be made, under the authority of the United States shall be the Supreme Law of the land, and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the Contrary notwithstanding." If federal forums do not promptly act when State courts refuse to do so it is as if the law was a whim.

The right to a speedy trial in a Criminal adjudication in both Federal and State proceedings is guaranteed by the United States Constitution, Amendment VI. The People

of the State of New York deny that such is the case. (Appendix I, p. 30a). They maintain that even after *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967); *Smith* v. *Hooey*, 392 U.S. 925, 393 U.S. 374 (1968); and *People* v. *Winfrey*, 20 N.Y. 2d 140 (1967), that a speedy trial is not a defendant's constitutionally protected right and thus it is more readily understood why Konigsberg has not been able to either vindicate or enforce a right in the State Courts which they do not admit exists in the first place.

New York has taken the position that defendants in cases involving Class "A" misdemeanors and consequently, involving substantial imprisonment, are not entitled to jury trials.[5] Having refused to acknowledge Konigsberg's right to a trial by jury in these circumstances even after *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Bloom* v. *Illinois*, 391 U.S. 194 (1968); *Frank* v. *United States*, 89 S. Ct. 1503 (1969); *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968), and *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966), it is patently obvious that Konigsberg cannot enforce or vindicate still another constitutional and civil right which is not recognized to him in the first place.

Leaving aside the New York County Prosecutor's design in maintaining an open case against Konigsberg in the event of an unfavorable result on his direct appeal is the fact that the Sixth Amendment to the United States Constitution and the Civil Rights flowing therefrom and available to all the citizenry is specifically denied Konigsberg by the New York County Prosecutor to Konigsberg as a member of a specific class of persons facing criminal charges in New York County.

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[5] If convicted, Konigsberg can receive one year on each of the twelve counts or a twelve year consecutive sentence.

The New York County Prosecutor does not dispute that a speedy trial and jury trial are not civil rights but claims that 28 U.S.C. Sec. 1443(1) must be narrowly construed. The pervasive and explicit denial to Konigsberg of a speedy trial and to any defendant facing trial proceedings in the Criminal Court of the City of New York of a Jury Trial which can be clearly predicted as inevitably denied by the very act of bringing a defendant to trial in that forum brings appellant with the meaning of *Chestnut* v. *New York*, 370 F.2d 1 (2d Circuit 1966).

Konigsberg's right to a Jury Trial will be denied by an explicit state procedure employed by the Criminal Court of the City of New York. *Greenwood* v. *Peacock*, 384 U.S. 808, 827-8 (1966).

CONCLUSION

May it please the Court, it is respectfully urged that the petition for a writ of certiorari be granted and may the Court exercise its supervisory powers over the administration of justice herein.

Dated: December 31, 1969.

Respectfully submitted,

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APPENDIX A

Docket Entries

May 14, 1969—Appellant's Petition for Removal

May 22, 1969—Affidavit of Service of Petition for Removal

May 27, 1969—Appellee's Motion for Remand

June 4, 1969—Appellant's Affidavit in Opposition

June 30, 1969—Memorandum Opinion and Order of Remand

July 22, 1969—Notice of Appeal

Aug. 4, 1969—Order Remanding Action to Criminal Court of the City of New York, New York County

Nov. 4, 1969—Affirmance of the United States Court of Appeals, Second Circuit

APPENDIX B

Memorandum Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Civil 2088

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

—against—

HAROLD KONIGSBERG,

Defendant.

TENNEY, *J.*

As a result of certain incidents occurring during the course of a trial in the New York State Supreme Court, New York County, wherein petitioner was named in an indictment charging him with four counts of extortion and one count of conspiracy,[1] a twelve-count information was filed in the Criminal Court of the city of New York on April 7, 1967, charging petitioner with various acts of criminal contempt in violation of Section 600(1) of the former New York State Penal Law.[2]

On September 18, 1968, petitioner moved in the Criminal Court of the City of New York for a speedy trial or, in the alternative, dismissal of the information. This motion was denied on October 18, 1968 and the case ordered marked off the calendar. Thereafter, petitioner, pursuant to Article 78 of the New York Civil Practice Law and Rules, sought an order in the Special Term of the New York Supreme Court directing the judges of the Criminal Court of the

[1] Pg. 1. Indictment No. 4725/63.

[2] Pg. 1. Docket N. B-3615'67.

Appendix B
Memorandum Opinion

City of New Yok to restore the contempt information to the calendar. The application was denied on January 3, 1969.

Petitioner moves herein,[3] pursuant to 28 U.S.C. § 1443 (1), for an order removing to this court the criminal contempt proceeding now pending befoe the Criminal Court. In turn, the State, pursuant to 28 U.S.C. § 1447(c), moves for an order remanding this case to that Court.

Title 28, United States Code, Section 1443, provides:

> "Any of the following civil actions or criminal prosecutions, commenced in a State court may be emoved by the defendant to the district court of the United States for the district and division embacing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof. . . ."

This Section entitles a defendant to emove a state court prosecution to the federal court only if the right upon which he relies is a "right under any law providing for . . . equal rights", and he is "denied or cannot enforce" that right in the state courts. While the right to a speedy trial guaranteed an accused by the Sixth Amendment to the Constitution is undoubtedly comprehended in the concept of "civil rights", the reference in Section 1443(1) is

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[3] Pg. 2. On August 9, 1968, petitioner sought removal of the criminal contempt action before the Honorable Sylvester J. Ryan of this court. This motion was denied on October 11, 1968, and the case remanded to the Criminal Court of the City of New York. *The State of New York* v. *Konigsberg*, 68 Civ. 3414 (S.D.N.Y., filed Oct. 11, 1968).

Appendix B
Memorandum Opinion

to "equal civil rights". The Supreme Court has concluded in *Greenwood* v. *Peacock*, 384 U.S. 808, 825 (1966), that that phrase does not include all of the broad constitutional guarantees of the Bill of Rights. And, in *Georgia* v. *Rachel*, 384 U.S. 780 (1966), the Court held that the guarantees of the First Amendment and the Due Process Clause of the Fourteenth Amendment, which are phrased in terms of general application available to all persons or citizens, are not contemplated by the phrase "any law providing for . . . equal civil rights". On the basis of the historical material available, the Court concluded that this phrase must be construed to mean "any law providing for specific civil rights stated in terms of racial equality." *Georgia* v. *Rachel, supra* at 792. *Chestnut* v. *New York*, 370 F.2d 1, 3 (2d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967).

In view of the fact that the civil right to a speedy trial relied upon by petitioner as the basis for removal of the criminal contempt proceedings is not couched in terms of equality, but rather is of general application available to all persons, he cannot succeed in this petition. *United States ex rel. Perkins* v. *Noble*, 287 F. Supp. 365, 366 (E.D.N.Y. 1968).

The vindication of the petitioner's federal rights must be left to the state courts wherein a motion may be made before the trial court for dismissal of the information for failure to proceed in consonance with the Sixth Amendment's guarantee of a speedy trial.

Accordingly, and for the reasons set forth herein, petitioner's motion for removal is denied and this proceeding is remanded to the Criminal Court of the City of New York, New York County.

So ordered.

Dated: New York, New York
June 30, 1969

CHARLES H. TENNEY,
U.S.D.J.

APPENDIX C

Notice of Appeal

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Docket No. .....

Civil Action 69 Civil 2088

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff-Respondent,

—against—

HAROLD KONIGSBERG,
Defendant-Appellant.

SIRS:

PLEASE TAKE NOTICE, that the above-named defendant hereby appeals to the United States Court of Appeals for the Second Circuit pursuant to Title 28, United States Code, § 1447, subsection (d), from the order of the United States District Court for the Southern District of New York, entered in the office of the Clerk of said Court on the 30th day of June, 1969, remanding the above-captioned action to the State Courts of the State of New York, to wit: the Criminal Court of the City of New York, County of New York, Docket No. B-3615/1967, and from each and every part of said Order as well as from the whole thereof.

Appendix C

Notice of Appeal

Dated: Brooklyn, New York, July 15th, 1969.

Yours, etc.,

FRANK A. LOPEZ
Attorney for Defendant-Appellant
Harold Konigsberg
Office & P. O. Address
44 Court Street
Brooklyn, New York 11201
Telephone (212) 522-0760

To:

HON. FRANK S. HOGAN
Attorney for Plaintiff-Respondent
District Attorney, New York County
155 Leonard Street
New York, New York

CLERK, CRIMINAL COURT,
100 Centre Street,
New York, N. Y.

CLERK, U.S.D.C.S.D.N.Y.,
U. S. Courthouse,
Foley Square, N. Y., N. Y.

APPENDIX D

Criminal Court Information

CRIMINAL COURT OF THE CITY OF NEW YORK

COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

—against—

HAROLD KONIGSBERG,

Defendant.

BE IT REMEMBERED that I, Frank S. Hogan, the District Attorney of the County of New York, by this information accuse the above-named defendant of the crime of CRIMINAL CONTEMPT, committed as follows:

Between December 7, 1966 and February 9, 1967 the above-named defendant was the defendant in the trial of a case entitled People of the State of New York against Harold Konigsberg, in Supreme Court, County of New York, before the Honorable Abraham J. Gellinoff, Justice of the Supreme Court.

On or about January 4, 1967 the above-named defendant did commit disorderly, contemptuous and insolent behavior during the sitting of the court in its immediate view and presence and directly tending to interrupt its proceedings and to impair the respect due to its authority, as the following testimony from the minutes of the above-mentioned trial demonstrates:

> The Court: The jury has paid absolutely no attention——
>
> The Defendant: That's what you think. That's what you think, because they are tired of listening to liars.

Appendix D
Criminal Court Information

The Court: All right, go ahead.

The Defendant: That's what you think they are, and they are tired of nonsense from you . . .

SECOND COUNT:

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information further accuse the said defendant of the crime of Criminal Contempt, committed as follows:

Between December 7, 1966 and February 9, 1967 the above-named defendant was the defendant in the trial of a case entitled People of the State of New York against Harold Konigsberg, in Supreme Court, County of New York, before the Honorable Abraham J. Gellinoff, Justice of the Supreme Court.

On or about January 5, 1967 the above-named defendant did commit disorderly, contemptuous and insolent behavior, during the sitting of the court in its immediate view and presence and directly tending to interrupt its proceedings and to impair the respect due to its authority, as the following testimony from the minutes of the above-mentioned trial demonstrates:

The Defendant: I want you—I want to move on the grounds that he was his agent, that I'm a witness against myself.

The Court: Right and so what do you want me to do?

The Defendant: I want you to throw it out.

The Court: You want me to throw it out?

The Defendant: Right.

The Court: O.K. Motion denied. Bring in the jury.

The Defendant: Jesus, you don't let me finish.

The Court: Bring in the jury, please.

The Defendant: You're not going to get along with me if you pull these tactics.

Appendix D
Criminal Court Information

The Court: All right. Now at this point——

The Defendant: I'll handle you in a different way. You do what you want. I'll do what I want.

The Court: Let the record reflect——

The Defendant: You don't want to believe me? Go ahead. You do what you please.

THIRD COUNT:

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information further accuse the said defendant of the crime of Criminal Contempt, committed as follows:

Between December 7, 1966 and February 9, 1967 the above-named defendant was the defendant in the trial of a case entitled People of the State of New York against Harold Konigsberg, in Supreme Court, County of New York, before the Honorable Abraham J. Gellinoff, Justice of the Supreme Court.

On or about January 5, 1967 the above-named defendant did commit disorderly, contemptuous and insolent behavior, during the sitting of the court in its immediate view and presence and directly tending to interrupt its proceedings and to impair the respect due to its authority, as the following testimony from the minutes of the above-mentioned trial demonstrates:

The Defendant: You know I travel back and forth every day, number one. I get up 5 o'clock, 4:30 in the morning, too; I'm not going to work after the regular hours.

Mr. Rogers: You can stay right here if you want, in this building, if you want, Mr. Konigsberg.

The Defendant: I'm not going to work any more than regular hours.

The Court: All right, Mr. Konigsberg, you work when I tell you to work.

Appendix D
Criminal Court Information

The Defendant: Not me.

The Court: Well, I say you are.

The Defendant: I say I'm not.

The Court: All right. Good night. See you tomorrow morning.

The Defendant: I don't think you'll see me tomorrow if you don't behave yourself.

The Court: All right.

The Defendant: I'm telling you in advance, don't try to bully me. If you try to dictate and bully me, you ain't going to get your way.

FOURTH COUNT:

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information further accuse the said defendant of the crime of Criminal Contempt, committed as follows:

Between December 7, 1966 and February 9, 1967 the above-named defendant was the defendant in the trial of a case entitled People of the State of New York against Harold Konigsberg, in Supreme Court, County of New York, before the Honorable Abraham J. Gellinoff, Justice of the Supreme Court.

On or about January 10, 1967, the above-named defendant did commit disorderly, contemptuous and insolent behavior, during the sitting of the court in its immediate view and presence and directly tending to interrupt its proceedings and to impair the respect due to its authority, as the following testimony from the minutes of the above-mentioned trial demonstrates:

The Court: Stop making these preliminary speeches Mr. Konigsberg: Just ask questions.

The Defendant: I'll do anything that I think is right.

Appendix D
Criminal Court Information

The Court: You'll get a chance to sum up later.

The Defendant: As long as you stop me on cross-examination and bring out the relevant facts as to his credibility, there will not be much to sum up.

The Court: All right, members of the jury, pay no attention to this man's statements. They are not——

The Defendant: No, please pay attention to the lying and perjuring witnesses, that people that come from—outside of Mrs. Burghof, who were perjurers, liars, frauders and crooks and thieves——

FIFTH COUNT:

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information further accuse the said defendant of the crime of Criminal Contempt, committed as follows:

Between December 7, 1966 and February 9, 1967, the above-named defendant was the defendant in the trial of a case entitled People of the State of New York against Harold Konigsberg, in Supreme Court, County of New York, before the Honorable Abraham J. Gellinoff, Justice of the Supreme Court.

On or about January 10, 1967 the above-named defendant did commit disorderly, contemptuous and insolent behavior, during the sitting of the court in its immediate view and presence and directly tending to interrupt its proceedings and to impair the respect due to its authority, as the following testimony from the minutes of the above-mentioned trial demonstrates:

The Court: Look, Mr. Konigsberg, we will take a recess now until 2:00 o'clock.

The Defendant: Let's make it 2:30. In that way, we will be safe.

The Court: No, 2:00 o'clock. Now, please, 2:00

Appendix D
Criminal Court Information

o'clock and you will have to finish with this witness. All right, put your next question.

The Defendant: And we have one here too. If the judge would let me dispose of him——

The Court: Go ahead.

* * * * *

The Defendant: I'll put him on the stand and everything will help me.

The Court: Oh, stop and go ahead and ask questions and don't——

The Defendant: Then why interrupt me?

The Court: Don't make statements.

The Defendant: Why interrupt me?

The Court: Please, Mr. Konigsberg, it is my duty to see that none but legal evidence——

The Defendant: Your duty.

The Court: ——is presented. It's my duty to see to it that the jury, when it renders the ultimate decision, renders it on one basis, to wit, what have they heard people on this witness stand swear to.

The Defendant: Swear to a perjury.

The Court: And——

The Defendant: Swear to a lie.

The Court: And that is the only——

The Defendant: Swear to a swindle.

The Court: ——thing on which they can base their decision, and not on any speeches, not on my speeches, or the district attorney's speeches——

The Defendant: No.

The Court: ——or your speeches.

The Defendant: I will not have to do anything other than cross-examine him to ascertain the truth. Nothing else will I have to do.

The Court: Just give the Court a chance to catch its breath.

Appendix D
Criminal Court Information

The Defendant: I again move for a mistrial on that statement, Judge. That is a ridiculous statement and unfair and very prejudicial to the defendant. The inflection there is dangerous. I'm sure you don't have heart trouble. God forbid. I really mean it, because you got big agates. There is no two ways about that, but I have to remember——

SIXTH COUNT:

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information further accuse the said defendant of the crime of Criminal Contempt, committed as follows:

Between December 7, 1966 and February 9, 1967 the above-named defendant was the defendant in the trial of a case entitled People of the State of New York against Harold Konigsberg, in Supreme Court, County of New York, before the Honorable Abraham J. Gellinoff, Justice of the Supreme Court.

On or about January 12, 1967 the above-named defendant did commit disorderly, contemptuous and insolent behavior, during the sitting of the court in its immediate view and presence and directly tending to interrupt proceedings and to impair the respect due to its authority, as the following testimony from the minutes of the above-mentioned trial demonstrates:

The Defendant: Once the defendant shows the motive, he destroys their credibility and that then it would be impossible to believe their testimony. The Court knows this. The Assistant District Attorney Rogers knows this and because of knowing this, they have done everything to suppress the defendant by doing this.

They have polluted the atmosphere of justice to the extent that it will destroy what the forefathers of this country . . .

Appendix D
Criminal Court Information

What is happening in this court undermines the fundamental fairness and goes to helping those who wish to destroy our United States Constitution of America. In this criminal trial, this Court has destroyed its own integrity in injustice that this Court has stated so many times that it is interested in justice and the administration of justice, is the most important thing in our heritage. This Court has a duty to perform in a fair and impartial way in this criminal case this Court has failed to do its duty. Justice requires fundamental fairness, decency and integrity. When this fails, the administration and the system of justice suffers irreparable harm. This Court has polluted the administration of justice to the point that the pollution has caused justice to be smothered to near death . . .

SEVENTH COUNT:

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information further accuse the said defendant of the crime of Criminal Contempt, committed as follows:

Between December 7, 1966 and February 9, 1967 the above-named defendant was the defendant in the trial of a case entitled People of the State of New York against Harold Konigsberg, in Supreme Court, County of New York before the Honorable Abraham J. Gellinoff, Justice of the Supreme Court.

On or about January 19, 1967 the above-named defendant did commit disorderly, contemptuous and insolent behavior, during the sitting of the court in its immediate view and presence and directly tending to interrupt its proceedings and to impair the respect due to its authority, as the following testimony from the minutes of the above-mentioned trial demonstrates:

Appendix D
Criminal Court Information

The Defendant: You was in fear, correct?

Witness: Correct.

The Defendant: Why didn't you immediately go to the FBI or the district attorney?

The Court: Objection sustained.

The Defendant: Oh, come on, your Honor.

The Court: Objection sustained.

The Defendant: Boy, you shortchange me every chance you get. I'm going to get you a job on the bus, you'll be the bus driver and then you can shortchange everybody.

I can't understand you. I do it properly for you and you won't let me do the right thing. Gee, oh God, I don't know what to say.

EIGHTH COUNT:

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information further accuse the said defendant of the crime of Criminal Contempt, committed as follows:

Between December 7, 1966 and February 9, 1967 the above-named defendant was the defendant in the trial of a case entitled People of the State of New York against Harold Konigsberg, in Supreme Court, County of New York, before the Honorable Abraham J. Gellinoff, Justice of the Supreme Court.

On or about January 20, 1967 the above-named defendant did commit disorderly, contemptuous and insolent behavior, during the sitting of the court in its immediate view and presence and directly tending to interrupt its proceedings and to impair the respect due to its authority, as the following testimony from the minutes of the above-mentioned trial demonstrates:

The Defendant: I'm glad that you got your humor back, Judge. It's been a shame that you aggravated yourself from people's statements that were not true.

Appendix D
Criminal Court Information

The Court: Go ahead.

The Defendant: And it's wrong when you——

The Court: Go ahead, Mr. Konigsberg.

The Defendant: ——when you don't get to the truth and the facts and the proof.

The Court: All right.

The Defendant: And that has been the basic problem with this Court.

The Court: All right.

The Defendant: The gimmicks, you know. You did a very bad and injustice thing to me, Judge. I'm ashamed of myself even to even think that, and I have a warm feeling for you.

The Court: All right, go ahead.

The Defendant: That happens to be the truth. You got big agates. But you can't take it away from him; it's too much for him.

NINTH COUNT:

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information further accuse the said defendant of the crime of Criminal Contempt, committed as follows:

Between December 7, 1966 and February 9, 1967 the above-named defendant was the defendant in the trial of a case entitled People of the State of New York against Harold Konigsberg, in Supreme Court, County of New York, before the Honorable Abraham J. Gellinoff, Justice of the Supreme Court.

On or about January 23, 1967 the above-named defendant did commit disorderly, contemptuous and insolent behavior, during the sitting of the court in its immediate view and presence and directly tending to interrupt its proceedings and to impair the respect due to its authority, as the following testimony from the minutes of the above-mentioned trial demonstrates:

Appendix D
Criminal Court Information

Mr. Rogers: If you stay with this case, it would be all right; but if you move around too much, you may get prejudicial material.

The Defendant: I can assure you I don't intend to move any place other than this case.

The Court: All right, use your head.

The Defendant: When are you going to use yours?

The Court: Go ahead, come on.

TENTH COUNT:

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information further accuse the said defendant of the crime of Criminal Contempt, committed as follows:

Between December 7, 1966 and February 9, 1967 the above-named defendant was the defendant in the trial of a case entitled People of the State of New York against Harold Konigsberg, in Supreme Court, County of New York, before the Honorable Abraham J. Gellinoff, Justice of the Supreme Court.

On or about January 24, 1967 the above-named defendant did commit disorderly, contemptuous and insolent behavior, during the sitting of the court in its immediate view and presence and directly tending to interrupt its proceedings and to impair the respect due to its authority, as the following testimony from the minutes of the above-mentioned trial demonstrates:

The Defendant: Now, would he not have testified—could he have pleaded to a misdemeanor and not testified?

The Court: All right, objection sustained.

The Defendant: This is relevant.

The Court: All right, the Court rules it's not relevant.

Appendix D
Criminal Court Information

The Defendant: It is

The Court: Go ahead.

The Defendant: You're part and parcel to this deal, buddy.

The Court: All right. Go ahead. Put your next question.

The Defendant: How long you going to swindle me out of my freedom and life?

The Court: All right, go ahead. You know, I stuck my neck out on this by saying, "Mr. Konigsberg, listen, my friend,"—now I'm——

The Defendant: My friend? You got ten dollars, I'll sell you back your friendship.

ELEVENTH COUNT:

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information further accuse the said defendant of the crime of Criminal Contempt, committed as follows:

Between December 7, 1966 and February 9, 1967 the above-named defendant was the defendant in the trial of a case entitled People of the State of New York against Harold Konigsberg, in Supreme Court, County of New York, before the Honorable Abraham J. Gellinoff, Justice of the Supreme Court.

On or about January 24, 1967 the above-named defendant did commit disorderly, contemptuous and insolent behavior, during the sitting of the court in its immediate view and presence and directly tending to interrupt its proceedings and to impair the respect due to its authority, as the following testimony from the minutes of the above-mentioned trial demonstrates:

The Court: Put your next question. Your (sic) made your objection. Objection overruled.

The Defendant: Does the testimony——

Appendix D
Criminal Court Information

The Court: Exception. Put your next question.

The Defendant: But the defendant wishes the Court to realize that the Court had done everything to provoke the defendant.

The Court: All right, go ahead.

The Defendant: And foreclose him on bringing out the proper evidence.

The Court: All right, go ahead.

The Defendant: And to show that he's innocent and show that there is contradiction and show credibility as to perjurers, the liars.

The Court: Put your next question, please.

The Defendant: Sure, Judge. What's the matter, your pants wet? I'm standing up.

TWELFTH COUNT:

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information further accuse the said defendant of the crime of Criminal Contempt, committed as follows:

Between December 7, 1966 and February 9, 1967 the above-named defendant was the defendant in the trial of a case entitled People of the State of New York against Harold Konigsberg, in Supreme Court, County of New York, before the Honorable Abraham J. Gellinoff, Justice of the Supreme Court.

On or about February 7, 1967 the above-named defendant did commit disorderly, contemptuous and insolent behavior, during the sitting of the court in its immediate view and presence and directly tending to interrupt its proceedings and to impair the respect due to its authority, as the following testimony from the minutes of the above-mentioned trial demonstrates:

The Court: All right. Motion denied. You have an exception. Next motion.

Appendix D
Criminal Court Information

The Defendant: I——

The Court: Now, start off with "I move that." Go ahead.

The Defendant: I move—I asked Mr. Kelley at 10:30 P.M. to talk to——

The Court: Stop. Stop.

The Defendant: This is a motion.

The Court: Look. I am ordering you, if you are making a motion—now, look, Mr. Konigsberg, you are going to learn once and for all that you are not a match for me. You understand?

The Defendant: Nobody said I was a match for you, Judge.

The Court: All right.

The Defendant: Nobody said I was a match for you. You're brilliant, Judge.

The Court: You make your motion.

The Defendant: You got too much balls for me.

APPENDIX E

Endorsement Hon. Sylvester J. Ryan, U.S.D.J., October 11, 1968

68 Civ. 3414

THE PEOPLE OF THE STATE OF NEW YORK

—v.—

HAROLD KONIGSBERG.

Endorsement

The defendant is confined in the United States Medical Center in Springfield, Mo., serving a 10 year sentence imposed by District Judge Shaw on July 16, 1963 in the United States District Court for the District of New Jersey.

On April 10, 1967 petitioner received an additional prison sentence of 30 to 44 years, following his conviction by jury verdict after trial in the Supreme Court, New York County, on four counts charging extortion and one count charging conspiracy, of Indictment No. 4725—1963. The jury acquitted petitioner of one count charging extortion and disagreed as to four other counts of this indictment.

These four counts remain pending and open. It is of record that petitioner filed a notice of appeal from this conviction and that the appeal is pending undetermined. Clearly, a motion to dismiss petitioner's appeal should be promptly made, or the appeal brought on for argument. Petitioner's trial on the remaining four may not long be constitutionally denied him.

Appendix E

Endorsement Hon. Sylvester J. Ryan, U.S.D.J.,
October 11, 1968

I find, however, that petitioner has not a claim for relief under Section 1443(1), Title 28, U.S.C., as ample remedies are available to him in the State Court by proceedings in the New York Supreme Court, Appellate Division, First Department, which he has not pursued. The removal of this indictment and of the appeal was improperly secured. The Indictment No. 4725—1963 and petitioner's pending appeal are remanded forthwith, and it is so ordered.

It also appears that, as a result of incidents occurring during petitioner's trial in the New York Supreme Court, a proceeding was commenced against petitioner in the Criminal Court of the City of New York on April 10, 1967 by the filing of an Information charging petitioner with the crime of Criminal Contempt in 12 counts, all in violation of Section 600, Subdiv. 1, of the former New York Penal Law. Annexed to the removal petition is a copy of this Information.

The record shows that petitioner has a motion for a speedy trial now pending in the Criminal Court of the City of New York. Petitioner has not exhausted his ample available remedies in the State Court and it appears that he has not been deprived of his federal constitutional rights. This proceeding is also forthwith remanded and it is so ordered.

Dated: October 11, 1968.

SYLVESTER J. RYAN
U. S. D. J.

APPENDIX F

Opinion of Hon. Mitchel D. Schweitzer

SUPREME COURT

NEW YORK COUNTY

TRIAL TERM, PART XXX

Indictment No. 4725/63

THE PEOPLE OF THE STATE OF NEW YORK

—against—

HAROLD KONIGSBERG,

Defendant.

SCHWEITZER, J.:

This is a pro se motion for a speedy trial of four remaining counts of the above indictment and, in addition, for a trial of a 12-count information pending in the Criminal Court of the City of New York wherein the defendant is charged with contempt arising out of the trial of this indictment.

The defendant was found guilty on March 15, 1967 of four counts of extortion, one count of conspiracy to commit extortion and was acquitted on one count of extortion. The jury could not reach a verdict on the remaining four counts. The defendant was thereafter sentenced on April 10, 1967. Subsequent thereto, an information was filed in the Criminal Court charging him with the aforementioned contempts.

After the conviction, the defendant filed a notice of appeal and the appeal is still pending.

Appendix F
Opinion of Hon. Mitchel D. Schweitzer

An examination of the records reflect that 17 months have passed since the date of judgment. Section 668 of the Code of Criminal Procedure states in substance that where a defendant has not been brought to trial at the next term of the court where the indictment has been found, and who has not sought postponement thereof, it is discretionary with the court to dismiss the indictment unless good cause to the contrary is shown by the prosecution. The rule is flexible and is discussed in People v. Prosser (309 N.Y. 353).

The district attorney assigns as good cause for not prosecuting the remaining counts of the indictment the fact that an appeal is pending from the conviction and the dilateriousness of the defendant has prevented a speedy determination. The prosecution also alleges that in view of the length of the sentence imposed, should the conviction be affirmed on appeal, there may be no necessity for retrying the open counts of the indictment.

The court finds, in the exercise of its discretion, that the averments of the prosecution constitute good cause for not granting the motion to dismiss the indictment (Bloeth v. Marks, 20 A. D. 2d 372; People v. Manasek, N.Y.L.J., December 3, 1963, p. 15, c.6-7 [West Co. Ct.]).

Furthermore, this court has no jurisdiction over the contempt case pending in the Criminal Court.

Counsel, who is the attorney of record herein, has petitioned the court to be relieved as counsel for the defendant. He asks that the defendant be brought before the court for the purpose of his application. The defendant is presently incarcerated in the United States Medical Center for Federal Prisoners in Springfield, Missouri. It is evident that a great expense and time would be involved in transporting the defendant to this jurisdiction and then returning him there. The court finds no reason for such action. Inasmuch as the court holds that the trial of the

Appendix F
Opinion of Hon. Mitchel D. Schweitzer

remaining counts be held in abeyance pending the disposition of the appeal, there is no reason to grant counsel's request. The application to be relieved is denied at this time.

The defendant's pro se motion is denied.

This constitutes the decision and order on the motion.

The clerk of the court is directed to forward a copy of this decision and order, with notice of entry, to the defendant at his present place of confinement and likewise to Frank A. Lopez, Esq., 133 Schermerhorn Street, Brooklyn, New York, 11201.

Dated: September , 1968.

M. D. S.,
J. S. C.

APPENDIX G

Judgment, Dated June 14, 1967

SUPREME COURT

NEW YORK COUNTY

SPECIAL TERM, PART I

Index No. 9206/1967

In the Matter of the Application of

FRANK A. LOPEZ,

Petitioner,

For a judgment prohibiting and enjoining the Criminal Court of the City of New York and the Office of the District Attorney of New York County, from proceeding further with the trial, New York County Docket #B3615/67, PEOPLE *v.* HAROLD KONIGSBERG, and ordering a change of venue,

—against—

THE HONORABLE JUDGES of the Criminal Court of the City of New York, severally and individually, the CLERK of said court, and the OFFICE OF THE DISTRICT ATTORNEY of New York County,

Respondents.

HELMAN, J.:

This is an Article 78 proceeding in which petitioner seeks to prohibit and enjoin the Criminal Court of the City of New York from prosecuting a twelve count information for the misdemeanor crimes of Criminal Contempt (Section 600(1) of the Penal Law) against one Harold Konigsberg, a defendant, or in the alternative for a change of venue.

Appendix G
Judgment, Dated June 14, 1967

It appears that the above violations occurred during a trial of the People of the State of New York against Harold Konigsberg, held in the Supreme Court, New York County, before the Hon. Abraham J. Gellinoff, between December 7, 1966 and April 10, 1967.

On a prior application petitioner sought a Certificate that the misdemeanors charged be prosecuted by indictment. Such relief was denied, so that, in effect, petitioner seeks to review, by this Article 78 proceeding, the prior judicial determination of another court.

Petitioner does not come within the purview of CPLR 7801 in that the relief sought herein is outside the intendment of that statute. Moreover, the Criminal Court of the City of New York has jurisdiction over the crime charged (Article 31 of the New York City Criminal Court Act). Neither the conduct of the prior proceedings nor the publicity received at that trial can serve to disqualify the entire body of Judges in the Criminal Court on the basis of the broad allegations that petitioner cannot receive a fair trial. The issue of prejudice as it may relate to any individual Judge of the Criminal Court is a matter to be raised in that court and not in the present proceedings. Also to be considered before the Criminal Court at the proper time is an application for a change of venue.

Accordingly, the application is denied and the petition is dismissed.

Dated: June 14th, 1967.

HELMAN,
J. S. C.

Filed
Sep. 7, 1967
County Clerk's Office, New York

APPENDIX H

Judgment, Dated January 3, 1969

At a Special Term, Part I thereof of the Supreme Court of the State of New York, held at the Courthouse, 60 Centre Street, New York, New York on the 3 day of January 1969.

Present: HON. CHARLES MARK,
Justice.

Index No. 17932/68

In the Matter of the Application of

FRANK A. LOPEZ,

Petitioner,

For a Judgment Directing the Judges of the Criminal Court of the City of New York, restoring Docket No. B-3615/1957, entitled The People of the State of New York v. Harold Konigsberg, Defendant, to the trial calendar, that said matter proceed to trial within a specific and definite period of time and in the alternative dismissing the said Information for failure to prosecute same,

—against—

THE HONORABLE JUDGES of the Criminal Court of the City of New York, severally and individually, the CLERK of the Criminal Court of the City of New York, and the HONORABLE FRANK S. HOGAN, District Attorney of New York County,

Respondents.

Appendix H
Judgment, Dated January 3, 1969

The above named petitioner having commenced this proceeding pursuant to Article 78 of the Civil Practice Law and Rules for a judgment against the Honorable Judges of the Criminal Court, the Clerk of the Criminal Court, and the Hon. Frank S. Hogan and the said proceeding having duly come on to be heard before me on December 6, 1968,

Now, on reading and filing the Order to Show Cause signed by the Hon. Vincent J. Lupiano, a Justice of this Court, on the 18th day of November, 1968, the Petition of Frank A. Lopez verified the 31st day of October, 1968 and the exhibits annexed thereto submitted in support of the application, and respondents Honorable Judges and the Clerk having submitted in opposition thereto by their attorney Louis J. Lefkowitz, an answer verified on the 4th day of December, 1968, and the affidavit of Roy R. Kulesar sworn to the 4th day of December, 1968 and the answer of the respondents sworn to December 5, 1968, and affidavit of Roy R. Kulesar sworn to 5th of December 1968 in opposition to the application, and due deliberation thereon having been had and the Court having rendered and filed its decision on December 10, 1968, directing a dismissal of the application,

Now, on motion of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for respondents, it is

ORDERED AND ADJUDGED that the application of the petitioner Frank A. Lopez is denied and the petition hereby dismissed.

Enter,

CHARLES MARKS,
J. S. C.

Filed
Jan. 13, 1969
New York County Clerk's Office

Appendix I

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

PART 2-B

Docket #B-3615/67

Sec. 600, Crim. Contempt

PEOPLE OF THE STATE OF NEW YORK

—against—

HAROLD KONIGSBERG,

Defendant.

ARGUMENT

Criminal Courts Building
100 Centre Street
New York, N. Y.
September 22, 1969

Before: HON. WILLIAM RINGEL,
Judge.

APPEARANCES:

FRANK A. LOPEZ, ESQ.,
44 Court Street, Bklyn, N. Y.

FOR THE PEOPLE:

FRANK S. HOGAN, District Attorney
of the County of New York,
155 Leonard Street, N. Y. C.

By: ROY KULCSAR,
Assistant District Attorney.

Bridge Officer:
Frank Ullmann

Official Court Reporter:
Sally M. Dowling

Argument

The Bridge Officer: This is Calendar Number 33; Docket Number B-3615/67, Harold Konigsberg, charged with criminal contempt; here for motion, Judge.

The Court: Who is the lawyer?

The Bridge Officer: Robert A. Lopez.

The Court: Motion to dismiss for lack of prosecution. It is a Grand Jury contempt, I believe. I would suggest you talk to your lawyer about this. Second call.

Second Calendar Call.

The Bridge Officer: This is a recall on Calendar Number 33; Docket Number B-3615/67, Harold Konigsberg, charged with criminal contempt. Counselor, will you state your appearance?

Mr. Lopez: The defendant is represented by Frank A. Lopez, 44 Court Street, Brooklyn, New York. Most respectfully, Judge Ringel, this is a motion for the dismissal of the instant information citing the defendant for 12 counts of contempt.

The Court: Is that the matter that appeared before Judge Gellinoff some time ago, and we had him on another case; and he went to the Federal Pen where he is doing 99 years or something?

Mr. Lopez: He is doing substantial time; approximately 44 years, Judge.

The Court: I am familiar with the facts.

Mr. Lopez: Judge, we have now made every conceivable motion; two Article 78 proceedings; we visited the Federal Court, twice. On both occasions, the Federal Court have remanded our actions, back to this Court, at one time for a speedy trial. Judge Tenney on his last occasion, when he considered this case returned it here for dismissal. This is one of the oldest cases on this calendar; never been tried before; one of the witnesses we had was Miss Frances Kahn, who is no longer a member of the bar of New York State; and as a matter of fact, in the Appellate decision disbarring her, indicated she had "disappeared."

The Court: Was she also sent to the Federal Pen?

Mr. Lopez: Yes. She was sentenced, unrelated to any of the cases pending or connected with Konigsberg, two years for another matter in the Southern District. We have asked for a trial, a speedy trial on innumerable occasions. The record is manifestly clear on this matter.

The Court: The information was handed down about two years ago.

Mr. Lopez: Was handed down in 19—as a matter of fact, was handed down on April 11 . . .

The Court: I remember having had it before me.

Mr. Lopez: If your Honor will respectfully, at that time, the People insisted on an immediate trial at that time, before we could make applications in the Supreme Court regarding certain motions with respect to jurisdiction.

The Court: What is the People's position?

Mr. Kulcsar: I would like to present papers.

The Court What is your position?

Mr. Kulcsar: Your Honor, the People have contended throughout the various motions that no defendant is actually guaranteed a right to a speedy trial in every case; that the Constitutional amendment was designed only for those who came within its purview.

The Court: The Court of Appeals disagrees with that.

Mr. Kulcsar: Excuse me, your Honor. That's not quite true. The People have maintained that its been standing in each case, that the defendant was primarily liable in the case for the delay; the People have contended that if the defendant executes his appeal which is now final before the Appellate Division after numerous extensions of time, that if that appeal was finally denied, the People will most likely never try the case because the defendant could receive either 44 to 50 years in prison on those charges. While each type case was brought to the Federal Court room, remand, it was remanded with a suggestion that it

be dismissed on that special trial, be treated with merely remanded with the suggestion that if the defendant wishes to pursue the case further, that those motions do lie.

The Court: What is that matter before the Appellate Division? Is that a motion to dismiss the information for some reason outside of delay in prosecution?

Mr. Lopez: Judge, may I be heard on that?

The Court: Yes.

Mr. Lopez: The direct appeal pending in the Appellate Division, defendant already perfected appeal, it is on for November term, has nothing to do with this case. It deals with this contempt that was tried before Judge Gellinoff for extortion and assault. What the People are saying is that when that appeal is over, maybe to the Court of Appeals or through the Federal system, then we will see about this case; but whether that appeal is finally denied has nothing to do with the charges here.

The Court: That's an information been handed down by the Grand Jury in this case, charging him with 12 counts of contempt of Court, and trial before Judge Gellinoff; what does that have to do with the appeal from the conviction before Judge Gellinoff?

Mr. Kulcsar: Directly, nothing; but the People have contended throughout, that based upon the facts of the contempt, and the belief by the People that should the defendant be once again brought before the Court for trial, in all likelihood, the same activities will occur; based upon the fact that the defendant is lodged in the Federal Penitentiary, and it will require People's expense to bring him here; plus the expense of going through a trial; and in the belief that the defendant's convictions will be upheld, it seems a waste of energy.

The Court: Why don't you dismiss the information?

Mr. Kulcsar: On the vague chance that there might be some appeal; there might be dismissal . . .

Argument

The Court: The impression I get is that you don't want to really prosecute this contempt; but you want to hold it in abeyance in the event that he has that reversal of conviction; and then, in that case, you want to leave something to go after him with. This is my impression.

Mr. Kulcsar: It's not so much to go after him with, your Honor.

The Court: I'm using that term advisedly; you get him on something else.

Mr. Kulcsar: Naturally, if the . . .

The Court: Either you prosecute the appeal on the contempt on what you have now, or it will be dismissed. I am going to set it down for a date certain. You tell me when the People will be ready to go to trial on it. I will mark it final against both.

Mr. Kulcsar: Will your Honor reserve decision until you have read the memorandum?

The Court: I am very familiar with this case. It has appeared before me.

Mr. Kulcsar: Your Honor, may I further state that when it did come before the Appellate Division on Article 78, Appellate Division did not dismiss on procedural grounds, but dismissed on Bloeth against Marks; and felt that the defendant had not been denied his right to a speedy trial.

The Court: Let me put it this way; how many years sentence did he get in the Federal Court?

Mr. Lopez: Ten.

The Court: How many years did he get in the State Court?

Mr. Kulcsar: 30 to 44.

The Court: How much is the maximum we can give him in this case? One year, isn't it?

Mr. Kulcsar: I don't know, your Honor.

The Court: You are going to add to the 54 years, one more year, if he is convicted?

Argument

Mr. Lopez: Judge, besides that, I would like to point out, that in the Pishatello case which your Honor wrote that opinion on, that has been confirmed in all of the higher courts including Supreme Court of the United States, which says that the sixth amendment right to speedy trial is guaranteed to every defendant.

The Court: I always thought so.

Mr. Lopez: Excuse me, your Honor; Judge, I would like to point out, this case previously was before you, and I approached the bench with Mr. Frank Rogers. I remember that. They weren't concerned with the appeal in the extortion conviction. They wanted the case tried right away.

The Court: I am very familiar with that case. The defendant get no medals, laurels, or wings hung on him.

Mr. Lopez: That's right, Judge, but . . .

The Court: But at the same time, he is entitled to a speedy trial of the information; and two years delay is, I think, unreasonable.

Mr. Kulcsar: Your Honor, may I make a further statement?

The Court: Yes, sir.

The Court: Yes, sir.

Mr. Kulcsar: The brief, I suggested the Federal Constitution's guarantee of a speedy trial, based on a recognition of certain interests of the defendant, and has attempt by the law to protect these specific interest. From Hanrahan vs. United States in the Federal Court on and a number of other cases citing these same items; case states that speedy trial provisions seek first to prevent lengthy pre-trial imprisonments or accused unable to make bail or pre-trial restriction of movement, when bail was available. Secondly, these provisions seek to minimize anxiety to dependents or relations when visited upon one under public accusations but not tried. Finally, they seek to insure that the ability of the accused person to answer the charges will not be impaired on account of lost witnesses and fade of memories due to the passage of time.

Argument

The Court: The key witness is Miss Kahn . . .

Mr. Kulcsar: Excuse me, your Honor, but the points in the contempt information based on minutes and records of the trial, not on the memory of one witness. The contempt information cites from the transcripts of the trial.

The Court: What is the difficulty in going to trial with it?

Mr. Kulcsar: Your Honor, the People wish not to have to go to trial on this case because of the defendant's activities during the initial trial, because of the defendant, himself; because of the character.

The Court: I will anticipate that whoever tried that case is going to have his hands full.

Mr. Kulcsar: And that is what the People wish to avoid.

The Court: That is, rather, dismiss the information, if you don't want to go to trial with it; but we can't keep it hanging open without some disposition either by trial or dismissal. I would not like to be the man to try it because I know Konigsberg. I say you can't keep it in limbo.

Mr. Kulcsar: Will your Honor reserve decision?

The Court: I am going to put it down for a day certain; final, People. You either try it, or dismiss it. Give me a date.

Mr. Kulcsar: Your Honor, Mr. Rogers will most likely try the case is already on trial.

The Court: You mean the Secretary of State. He used to be with the D.A. . . . we need a man like him to try it.

Mr. Kulcsar: Frank Rogers will try the case, your Honor; so why don't we put it on for next week?

The Court: I am going to fix a date for trial.

Mr. Kulcsar: I haven't spoken to him, about when he will be finished with the other trial.

The Court: What case?

Argument

Mr. Kulcsar: I think Scandifia and Lombardozzi.

The Court: Supposing we put this down in November sometime? He ought to be finished by then. Give me a date in November, gentlemen.

Mr. Kulcsar: How about November 5, your Honor?

The Court: That's the day after election, no. You gentlemen give me another date.

Mr. Kulcsar: November 12?

The Court: All right. November 12. Final, People.

* * * * *

I certify that the above is a true and accurate record of the proceedings held herein.

/s/ SALLY M. DOWLING

SALLY M. DOWLING
Official Court Reporter

APPENDIX J

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 226—September Term, 1969.

(Submitted November 4, 1969 Decided November 4, 1969.)

Docket No. 33939

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff-Appellee,

—v.—

HAROLD KONIGSBERG,
Defendant-Appellant.

Before: WATERMAN, FRIENDLY and SMITH,
Circuit Judges.

Appellant, who brought removal proceedings from the Criminal Court of the City of New York, New York County, to the United States District Court for the Southern District of New York, appeals from an order, Tenney, *J.*, remanding the cause back to the State Court. Order of remand affirmed.

ROY R. KULSCAR, Michael R. Juviler, David Otis Fuller, Jr., Asst. District Attorneys, Frank S. Hogan, District Attorney, New York County, *for Plaintiff-Appellee.*

FRANK A. LOPEZ, Brooklyn, N. Y., *for Defendant-Appellant.*

PER CURIAM:

We affirm the order of remand below on the opinion of Judge Tenney, and we order that our mandate be issued forthwith.

APPENDIX K

Constitutional Provisions Involved

ARTICLE VI, CLAUSE 1, § 2:

"The Constitution, and the Laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land; . . ."

FIRST AMENDMENT:

"Congress shall make no law respecting an establishment or religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . and to petition the Government for a redress of grievances."

FIFTH AMENDMENT:

"nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

SIXTH AMENDMENT:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

EIGHTH AMENDMENT:

"nor cruel and unusual punishments inflicted."

FOURTEENTH AMENDMENT:

"nor shall any State deprive any person of life, liberty, or property, without due process of law."

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IN THE

Supreme Court of the United States

October Term, 1969

No. 1139 [redacted]

HAROLD KONIGSBERG,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
STATEMENT OF THE ISSUE	2
STATEMENT OF THE CASE	2
The State Criminal Proceedings	2
The Prior Removal Proceeding and Concurrent State Proceedings	5
The Present Removal Proceeding and Concurrent State Proceedings	6
ARGUMENT	
Since the petitioner's contention that he has been denied a speedy trial is not a ground for removal to the federal court under 28 U.S.C. Section 1443(1), the criminal prosecution pending against him was properly remanded to the state court	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:

Chestnut v. New York, 370 F.2d 1 (2d Cir. 1966)	9
Georgia v. Rachel, 384 U.S. 780 (1966)	9, 10
Greenwood v. Peacock, 384 U.S. 808 (1966)	10
United States *ex rel.* Perkins v. Noble, 287 F.Supp. 365 (E.D.N.Y. 1968)	9
Willingham v. Morgan, 395 U.S. 402 (1969)	8

Statutes:

Title 28, United States Code	
Section 1254(1)	1
Section 1443(1)	1, 6, 8
Section 1447(c)	7

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

The petitioner seeks a writ of certiorari from this Court to review the order of the United States Court of Appeals for the Second Circuit, entered in this case on November 4, 1969 (see petitioner's brief, Appendix J, p. 38a). The jurisdiction of this Court is sought to be invoked pursuant to 28 U.S.C. Section 1254(1).

Statement of the Issue

Whether the Court below properly remanded petitioner's criminal proceeding to the New York City Criminal Court on a finding that petitioner's claim of denial of a speedy trial did not come within the purview of Title 28 U.S.C. Section 1443(1) permitting removal of an action from a state court to a federal court.

Statement of the Case

The State Criminal Proceedings

On December 10, 1963 a New York County Grand Jury filed Indictment No. 4725/63 charging petitioner and three others with one count of conspiracy as a felony, six counts of extortion, two counts of assault in the second degree and one count of attempt to commit the crime of extortion.

Between January 26, 1965 and April 27, 1965 a hearing was held in Supreme Court, New York County, by the Honorable ABRAHAM GELLINOFF, Justice of the Supreme Court, on petitioner's motion to determine his mental competency to stand trial. On April 27, 1965, Justice GELLINOFF confirmed the Bellevue Hospital report and found the petitioner competent to stand trial.

In May of 1965, the federal prison authorities requested permission of the New York County District Attorney's Office to transfer petitioner from the West Street House of Detention in New York County to a federal prison that was equipped with medical facilities.

On October 4, 1966, at the expense of the State of New York, the petitioner was ordered transferred from the Medical Center for Federal Prisoners at Springfield, Missouri to New York City to stand trial on the aforementioned indictment.

Between November 17 and December 2, a second sanity hearing was held concluding in an order that petitioner was competent to stand trial on Indictment No. 4725/63. The trial of this indictment took place over an eight-week period from December 7, 1966 to February 9, 1967 and resulted in a jury verdict finding petitioner guilty on four counts of extortion and one count of conspiracy to commit extortion. Petitioner was found not guilty on one count of extortion and no verdict was reached on two counts of assault in the second degree, one count of extortion and one count of attempted extortion.

On March 13, 1967, a trial was had to determine whether the petitioner was a prior felony offender which trial resulted in a verdict, on March 15, 1967, that petitioner had been convicted of two prior felonies. Thereafter, on April 10, petitioner was by judgment of the court sentenced to 30 to 44 years in State Prison.

Following judgment, petitioner Konigsberg was returned to the Federal Prison at the U.S. Medical Center in Springfield, Missouri, to complete serving a ten-year federal sentence for violation of Title 18 U.S.C. Section 659 (possession of stolen goods in interstate commerce). Petitioner is to commence serving his state sentence after completion of his federal sentence.

On April 11, 1967, petitioner served notice of his intention to appeal his conviction in New York County. On September 1, Frank Lopez, Esq., counsel of record for petitioner, made application for extension of time to perfect said appeal until the January, 1968 Term of the Appellate Division, First Department, of the New York Supreme Court. A second application for extension of time was made on December 8, and was granted until the April, 1968 Term. Petitioner then made a pro se application for a further extension of time until May, 1969 which was also granted. To date petitioner has, through these numerous motions, managed to delay the hearing of his appeal by the New York State Supreme Court, Appellate Division, First Department, until May, 1969. As a result of the lengthy record on appeal consisting of approximately 4,000 pages of sentencing proceeding and 2,500 pages of competency hearings, as well as the number of arguments raised on appeal (23 in number), the People were obliged to request an adjournment of the appeal which was granted. The People have submitted their brief and the appeal is now pending in the Appellate Division.

On April 7, 1967 in New York County, a twelve-count information was filed in the Criminal Court of the City of New York charging petitioner with various acts of contempt arising out of his conduct during the course of his trial from December 7, 1966 to February 9, 1967.

No date has been set for the trial of the counts of Indictment No. 4725/63 on which no verdict was reached.

The Prior Removal Proceeding and Concurrent State Proceedings

On August 9, 1968, the petitioner petitioned the United States District Court for the Southern District of New York for a removal of the contempt prosecution pending against the petitioner in the Criminal Court of the City of New York, County of New York, under Docket No. B-3615/67, as well as the remaining four counts of Indictment No. 4725/63, to the United States District Court (68 Civ. 3414).

On September 16, an order was entered in Part XXX, Supreme Court of the State of New York, New York County, by Justice MITCHELL D. SCHWEITZER, denying petitioner's motion for a speedy trial of the four counts of Indictment No. 4725/63 on which no verdict was reached, and finding that the People had established good cause for delay in trying petitioner on these counts (see Petitioner's Appendix F, p. 23a).

On September 18, petitioner, by his attorney Frank A. Lopez, Esq., filed a motion for a speedy trial or dismissal of the contempt information (Docket No. B-3615/67) in the Criminal Court of the City of New York. On October 18, 1968, Judge DANIEL WEISS denied the motion and ordered that the case be marked off the calendar.

On October 11, an order was entered in the United States District Court for the Southern District of New York, by District Judge SYLVESTER J. RYAN denying the petition for removal and remanding the proceedings to the state courts (see Petitioner's Appendix E, p. 21a).

In November of 1968, petitioner, by his attorney Frank A. Lopez, Esq., pursuant to the provisions of Article 78 of the New York Civil Practice Law and Rules, petitioned Special Term, Part I, of the Supreme Court of the State of New York, seeking a judgment directing the Judges of the Criminal Court of the City of New York to restore the contempt information (Docket No. B-3615/67) to the calendar. On January 3, 1969, the Honorable CHARLES MARKS denied the application and dismissed the petition (see Petitioner's Appendix H, p. 28a).

In November of 1968, the petitioner, by his attorney Frank A. Lopez, Esq., petitioned the Appellate Division of the New York Supreme Court, First Department, pursuant to the provisions of Article 78 of the New York Civil Practice Law and Rules, directing that Indictment No. 4725/63, now pending in the Supreme Court, New York County, be restored to the trial calendar, be moved for trial within a specific and definite time and, in the alternative, for failure to do so without good cause, for the dismissal of the indictment. On January 16, 1969, the court, by the Honorable HAROLD A. STEVENS, Presiding Justice, dismissed the petition.

The Present Removal Proceeding and Concurrent State Proceedings

On May 14, 1969, a petition for removal of the contempt information pending before the Criminal Court of the City of New York (docket no. B-3615/67) was filed in the United States District Court for the Southern District pursuant to Title 28 U.S.C. Section 1443(1).

On May 27, 1969, a motion for remand was filed by the office of the District Attorney, New York County, pursuant to Title 28 U.S.C. Section 1447(c) and on June 30, 1969, the proceedings were ordered remanded by District Judge CHARLES TENNEY, who found that the prosecution pending against petitioner did not fall within Title 28 U.S.C. Section 1443(1) and that therefore his petition for removal did not lie (see Petitioner's Appendix B, p. 2a).

On July 22, 1969, petitioner, by his attorney Frank A. Lopez, Esq., filed a notice of appeal from the order of District Judge TENNEY. In August of 1969, the petitioner, by his attorney Frank A. Lopez, Esq., filed a motion in the Criminal Court of the City of New York seeking a dismissal of the pending contempt information (Docket No. B-3615/67), together with such other relief as the court would deem just and proper. On September 22, Judge WILLIAM RINGEL ordered the contempt information restored to the calendar for trial. The case is now on the calendar for April 7, 1970 in Part 2B1 of the Criminal Court of the City of New York.

On November 4, 1969, the United States Court of Appeals for the Second Circuit unanimously affirmed the order of remand (see Petitioner's Appendix J, p. 38a).

ARGUMENT

Since the petitioner's contention that he has been denied a speedy trial is not a ground for removal to the federal court under 28 U.S.C. Section 1443(1), the criminal prosecution pending against him was properly remanded to the state court.

The petitioner contends that he is being denied his constitutional right to a speedy trial by the state court, and he seeks to have the pending New York Criminal Court information removed to the federal court pursuant to Title 28 U.S.C. Section 1443(1).

The question actually being raised, however, is not whether the petitioner is entitled to a speedy trial, but whether removal of the action to the federal court is the appropriate means for testing his contention that he is being denied a speedy trial.

Congress, in the enactment of 28 U.S.C. §1443(1), set forth specific requirements that must be complied with before removal of an action is warranted. Likewise, this Court has recently reaffirmed, in an opinion concerning a removal proceeding, that the state has a compelling interest in conducting criminal trials in its own courts. *Willingham* v. *Morgan*, 395 U.S. 402, 409 n. 4 (1969).

It is clear both from the applicable statute and this Court's interpretation that the case now pending against the defendant Konigsberg in the Criminal Court, New York County, may not be removed to the federal court. Title 28 U.S.C. Section 1443(1) provides that:

> "Any of the following civil actions or criminal prosecutions, commenced in a State Court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> "(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof * * *."

This statute contemplates removal of state prosecutions to the federal court against persons who cannot enforce a right in the state courts under "any law providing for specific civil rights stated in terms of racial equality." *Georgia* v. *Rachel*, 384 U.S. 780, 792 (1966); see, *Chestnut* v. *People of the State of New York*, 370 F. 2d 1 (2d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1966). Only when the right upon which the defendant relies is a "right under any law providing for equal civil rights," and the defendant is "denied or cannot enforce" that right in the state courts, do the provisions of Section 1443 apply.

Where, as in the present case, the right is of general application to all persons or citizens, petitioner is not entitled to have a state criminal prosecution removed under the statute providing for removal in civil rights cases. *United States ex rel. Perkins* v. *Noble*, 287 F. Supp. 365 (1968); see *Georgia* v. *Rachel, ante.*

Moreover, petitioner's application is insufficient in a further respect. The allegation of the petitioner is that the judiciary of the State of New York is acting in an unjust manner, thereby depriving him of his constitutional

right to a speedy trial. His allegation is not, as required by Title 28 U.S.C. Section 1443(1), that his rights will be denied because of the operation of an explicit state law. This Court, in *Greenwood* v. *Peacock*, 384 U.S. 808, 827-8 (1966), has designated the touchstone to be applied in deciding removal cases under this statute. This Court stated:

> "* * * It is not enough to support removal under Section 1443(1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. * * * The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial. Under Section 1443(1) the vindication of the defendant's federal rights is left to the state courts except in rare situations where it can be clearly predicted by reason of the operation of a persuasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court. *Georgia* v. *Rachel, ante; Stauder* v. *West Virginia*, 100 U.S. 303."

The "provisions of Section 1443(1) do not operate to work a wholesale dislocation of the historic relationship between the state and federal courts in the administration of the criminal law." *Id.* at 831. It is not enough for the petitioner to claim the right of removal afforded by Title 28 U.S.C. Section 1443(1)—he must come within the purview of those for whom this right is intended. This he has failed to do. Since petitioner has not shown that his

asserted federal constitutional rights have been denied him by the operation of state law [see *Greenwood* v. *Peacock*, 384 U.S. 808, 827-8 (1966)], removal does not lie and his petition for a writ of certiorari should be denied.

Conclusion

The petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

MICHAEL R. JUVILER
DAVID OTIS FULLER, JR.
ROY R. KULCSAR
Assistant District Attorneys
- Of Counsel

February, 1970

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IN THE

Supreme Court of the United States

October Term, 1969

No. 1139

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

HAROLD KONIGSBERG,

Petitioner.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF FOR THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Reply—Statement of the Case	1
Reply—Argument (Respondent's Opposition Brief, pp. 8-11)	3
Conclusion	4

TABLE OF AUTHORITIES

Case:

Kane v. Virginia, 6 CrL 2328 (4th Cir., January 19, 1970) 3

Relevant Statutes:

Title 18, United States Code:

§659 2
§4085 3
§4241 4

Title 28, United States Code:

§1443 (1) 4
§2254 3

IN THE

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No. 1139 Misc.

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On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF FOR THE PETITION FOR A WRIT OF CERTIORARI

Reply—Statement of the Case

In the respondent's brief in opposition to the petition for certiorari, The People of the State of New York attempt to deliberately confuse the matter of petitioner's direct appeal from a conviction in the New York State Supreme Court, New York County, for 4 counts of extortion and 1

count of conspiracy to commit extortion in which petitioner was sentenced on April 10th, 1967, to 30 to 44 years in State Prison,[1] with the 12-count contempt information pending in the New York City Criminal Court, New York County, in which petitioner has never been tried and respondent steadfastly refused to accord petitioner a trial, maintaining at the same time open charges against petitioner since April 7th, 1967, in New York and a State detainer against petitioner at his present place of confinement at the United States Medical Center, for Federal Prisoners, Springfield, Missouri, where petitioner is serving a Federal sentence.[2]

The respondent's patently obvious intention is to ask this Court to assign the *alleged delay* in the prosecution of petitioner's direct appeal to the New York State Appellate Division, First Department, from the extortion conviction to the trial to which petitioner is entitled in the New York City Criminal Court on the contempt information. The validity of the New York Supreme Court indictment for extortion and assault and the disposition of the New York State appeal from petitioner's 30- to 44-year sentence in no way effects the legal significance of the Criminal Court information involving other subject matter.

1. Petitioner's direct appeal from his conviction in the New York State Supreme Court was argued in the Appellate Division, 1st Department, on February 5th, 1970. No decision has been rendered as of this date. The Appellate Division had no reason to consider the Criminal Court information since petitioner has never been tried nor does it have anything to do with the direct appeal from the extortion conviction.

2. Petitioner was sentenced in the United States District Court for the District of New Jersey, on July 16th, 1963, to a term of 10 years for violation of 18 U.S.C. §659.

Reply—Argument (Respondent's Opposition Brief, pp. 8-11)

Respondent does not deny in its opposition that petitioner is being denied a speedy trial and a jury trial in the New York City Criminal Court. Nor does it mention that by virtue of maintaining an *open case* against petitioner until such time as it knows the appellate disposition of another unrelated case emanating from another Court is a failure in due process itself and moreover has the collateral effect of lodging a State detainer against petitioner in his present Federal confinement. *Kane* v. *Virginia* (4th Cir., January 19, 1970) 6 CrL 2328.

The record is clear as to the following:

1. Petitioner has demanded a speedy trial.

2. The New York authorities have failed and refused to make any effort to obtain him for trial from the United States Attorney General pursuant to his authority under 18 U.S.C. §4085.

3. Petitioner has evidently exhausted his State remedies as required by 28 U.S.C. §2254.

4. The respondent has acknowledged that it does not wish to try the petition on the contempt information. (Petitioner's Appendix I, pp. 33a-34a.)

5. Petitioner is presently a Federal prisoner and was so at the time of the acts complained of in the New York Criminal Court Information.

6. The petitioner during December 7th, 1966 to February 9th, 1967, the period covered by the Criminal Court Information, was a Federal prisoner in Federal custody and certified insane pursuant to 18 U.S.C. §4241.

Having exhausted all his state remedies without vindication of his constitutional and civil rights, petitioner has no other remedy than to seek redress in the Federal tribunals. The respondent argues for a formalistic interpretation of 28 U.S.C. §1443 (1) cloaking it specifically and exclusively in terms of racial inequality.

The right to a speedy and jury trial are constitutional and civil rights which the petitioner cannot enforce in the New York City Criminal Court. The record here reflects that the pervasive and explicit denial to petitioner of a speedy and jury trial is the avowed purpose of the respondent and as such this conduct comes within the legal import of Section 1443.

Conclusion

The petitioner's petition for a writ of certiorari should be granted.

Respectfully submitted,

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